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Issue Date: 23 September 2005

CASE NO. 2004-LHC-00984
OWCP NO. 01-152274

In the Matter of

THOMAS LITTELL
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

Appearances:

James W. Case, Esq., McTeague, Higbee, Case, Cohen, Whitney & Toker, P.A., Topsham, Maine, on behalf of the Claimant

Stephen Hessert, Esq., Norman, Hanson & DeTroy, LLC, Portland, Maine, on behalf of the Employer/Self-Insurer

BEFORE: Colleen A. Geraghty
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS AND SPECIAL FUND RELIEF

I. Statement of the Case

This proceeding arises from a claim for workers' compensation benefits filed by Thomas Littell (the "Claimant") against the Bath Iron Works Corporation ("BIW" or "Employer"), under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the "LHWCA" or the "Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing before the undersigned held on June 21, 2004 in Portland, Maine.

At the hearing the parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel for the Employer/Self-Insured. The parties offered stipulations, and testimony was heard from the Claimant. The hearing transcript is referred to as "TR". Documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-11, and Employer's Exhibits ("EX") 1-38. TR 7-8. The official papers were admitted without objection as ALJ Exhibits ("ALJX") 1-12. *Id.* at 9-11. Following the hearing, the parties filed post-hearing briefs, and the record is now closed.

After careful analysis of the evidence contained in the record and the testimony offered, I conclude that the Claimant is entitled to compensation for his work-related cervical spine injury, as well as attorney's fees. I further find that BIW is entitled to relief from the Special Fund pursuant to Section 8(f) of the Act. My findings of fact and conclusions of law are set forth below.

II. Findings of Facts and Conclusions of Law

A. Stipulations and Issues Presented

The parties stipulated to the following: (1) the Longshore and Harbor Workers' Compensation Act applies to the claim; (2) the injury occurred on March 16, 2001; (3) the injury occurred at Bath Iron Works Corporation in Bath, Maine; (4) the injury arose out of and in the course of the Claimant's employment with BIW; (5) an employer/employee relationship existed at the time of the injury; (6) the employer was notified of the injury on a timely basis and the claim for benefits was timely filed and controverted; (7) the informal conference was held on August 28, 2003; (8) the average weekly wage at the time of injury was $621.48; (9) the Claimant has been paid for temporary total disability first for a period from March 27, 2001 to May 9, 2001, and then for a period commencing on November 27, 2001 and continuing; (10) the Claimant's medical benefits have been paid; and (11) the date of permanency for the injury is March 16, 2002. TR 5-7.

The issues in dispute are (1) the nature and extent of the disability; and (2) whether the Employer/Self-Insured is entitled to liability relief from the Special Fund pursuant to Section 8(f) of the Act.

B. Background

The Claimant was 52 years old at the time of the hearing. TR 18. He completed high-school, but has no post-secondary education. *Id.* at 19-20. Prior to his employment at BIW, he worked as a laborer at a lumber company and a steel mill, and was a materials handler at Airlock Plastics. *Id.* at 20; EX 30 at 5-7. As a teenager he sustained a serious injury to his left hip which resulted in a series of surgeries in 1967 and 1968 and the placement of two orthopedic pins in his hip. TR 19, 56. As a result of the surgeries, the Claimant's left leg was shortened approximately three-quarters of an inch, which he corrects by wearing a lift in his left shoe. *Id.* at 19. According to the Claimant, BIW became aware of this condition through the interview process, as the Claimant informed BIW about this condition and it was visually apparent, although the

condition did not require any work restrictions at that time. EX 30 at 19, 22. He began working at BIW in 1976 as a grinder, using pneumatic tools to grind steel. TR 19- 20; EX 30 at 15-16. He subsequently worked as a driller and burner, until he became classified as a shipfitter in 1994. TR 21. As a shipfitter his primary duties were burning and grinding steel. *Id.* at 22.

During the course of his employment at BIW, the Claimant held elected positions with the Local S-6 Union, including shop steward, grievance committee member, chief steward and business representative. TR 64; EX 30 at 8. He was a shop steward from approximately 1982 to 1988, responsible for processing grievances and representing union members in his department in any disputes they had with management. EX 30 at 9-10. During that time, the Claimant worked full-time as a laborer, and only performed his union duties occasionally as needed. *Id.* The Claimant was also a member of the four person grievance committee for two consecutive terms while he was a steward, and was responsible for deciding by vote whether or not union members' grievances were valid and whether the grievance would move to the next step in the process. *Id.* at 10-12. The Claimant was chief steward for five years, and as such he worked with tools very infrequently, doing so only when the Employer was shorthanded. TR 65-66. As chief steward, his main responsibility was processing grievances in the final step of the grievance process before they escalated to arbitration. TR 67; EX 30 at 13. He was also the union business representative from 1995 to 1999, and his duties included interacting with grievants regarding their claims, attending meetings, resolving issues related to dues, and negotiating with management. TR 67-69. For the nine to ten year period prior to 1999, most of his work involved representing fellow workers and negotiating grievances, and did not involve working with tools. *Id.* at 69.

In 1987, the Claimant sustained a work injury to his left knee when he slipped off a beam and his knee was crushed between two pieces of steel and had to be extricated. TR 22. He underwent treatment for this injury and eventually had knee surgery in 1987. *Id.* at 22-23, 57. Since 1987, there have been permanent work restrictions in place for his knee. *Id.* at 59. The Claimant testified that he continues to have problems with his knee, and the change in his walking stride due to the knee injury has caused his hip to become progressively worse. TR 23; EX 30 at 26. As a result of his aggravated hip injury, he had hip replacement surgery in 1997 and was out of work for three months. TR 23-24. When he returned to work, he returned with permanent work restrictions which are still in effect, including no bending, stooping, climbing stairs or ladders. *Id.* at 24, 59. BIW accommodated these limitations and assigned him work in the aluminum shop building, rather than on ships where he had been working previously. *Id.* at 24. Despite being assigned work that was, according to the Claimant, "well within" his limits, he was still taking daily medication for pain that was generating from his knee. *Id.* at 25. Further, at the time of the hip surgery, the Claimant began experiencing neck stiffness as a result of sleeping in a chair and favoring his left side due to the surgery. *Id.* at 25-26; EX 30 at 29. To remedy this, Dr. Peter Guay, his treating orthopedist, prescribed a soft collar neck brace and took x-rays of the area. TR 26. The Claimant stated that as he began to exercise and walk again after his recovery from surgery, the neck problems "went away." *Id.*

Due to the work restrictions for his hip and knee, the Claimant worked in a "scrunched over" position underneath raised platforms approximately five feet off the ground. EX 30 at 32-33. On March 16, 2001, the Claimant was injured when in the course of his work he was

crouched down under the unit he was working on and walking forward at a rapid pace. TR 27. He testified that he did not see an overhead structure and struck it in the center of his hard hat, punching a hole in the hat and jamming his head into his shoulders, giving him the feeling that he had been "electrocuted." *Id.*; EX 30 at 35-36. The impact bent his head back and he fell to the ground seeing "stars and birds." TR 28. After the impact, he sat for approximately one hour and then felt the fingers in his left hand start to tingle. *Id.* at 29. He sought medical attention at the first aid department at BIW under the care of Maria Mazzora, M.D. *Id.* at 28. Dr. Mazzora sent him to the hospital to have x-rays. *Id.*; CX 3 at 8. He returned to the yard, was prescribed medication by Dr. Mazzora, and was sent home. *Id.* The Claimant asserts that after the accident, his neck was very stiff and painful, and when he moved his neck to one side or the other, he felt stabbing and burning pains in his shoulder blades, in the center of his left side and down his left side into his little finger and ring finger. *Id.* at 30-31.

According to Susan Schraft, MD, the MRI of the Claimant's cervical spine dated March 21, 2001 showed cervical spondylosis and a disk herniation at C-6-7. EX 19 at 114. On referral from Dr. Mazzora, the Claimant was seen by Lee Thibodeau, M.D., a neurosurgeon, on March 27, 2001. TR 29. Dr. Thibodeau confirmed that there was cervical spondylosis and a C-7 radiculopathy and recommended surgery, but the Claimant was reluctant to have surgery and saw Michael Totta, M.D. for a second opinion. *Id.* at 35-37; CX 17 at 92. Dr. Totta expressed concerns over the risks of a multi-level procedure and recommended that the Claimant continue with medication and physical therapy to treat his symptoms rather than undergo surgery. TR at 35-37; CX 6 at 22. The Claimant returned to BIW in the first part of April doing light duty work, and reported to first aid on a daily basis for traction and heat therapy. TR 37-38.

According to the Claimant, in November 2001, he went to see Dr. Mazzora because his symptoms were getting worse and had returned to the state they were at when he was initially injured. TR 38. He was experiencing shooting pains in the back of his neck and shoulders which were going down his left arm and into his small finger and ring finger. *Id.* As a result, Dr. Mazzora removed him from work at that time and Dr. Thibodeau increased the conservative treatment and recommended that the Claimant see John Pier, M.D. for pain management. *Id.* at 38-39; EX 30 at 42-43. Dr. Mazzora continued to treat the Claimant after he was taken out of work until July of 2002, when she requested that Jack Waterman, M.D., the Claimant's primary care physician, assume the responsibility for the Claimant's ongoing care. TR 40-41. Dr. Waterman has continued to provide care to the Claimant since that time. *Id.* at 41.

The Claimant testified that he continues to have pain in his neck and shoulders, and although the shooting pains into his fingers have subsided, his left ring finger and little finger are always numb and feel like they are asleep, and there is a "pins and needle" sensation if they are tapped. TR 31. His neck is permanently stiff and he has a difficult time looking up or down or bending. *Id.* He wears a soft neck brace every night when he sleeps and stated that he has difficulty sleeping because he must sleep in an uncomfortable position due to the brace. *Id.* at 31, 47. He does a series of exercises at least once a day with a cervical traction device to relieve the pain and throbbing in his hands, and he is unable to tie his shoes or bend over. *Id.* at 31, 33. The Claimant stated that if he moves the wrong way, he may have "a spell" that can last a month, where his symptoms are exacerbated to a point that is unbearable and he must use traction three times daily to reduce the pain. *Id.* at 32.

C. Testimony of Mats Agren, M.D.

Mats Agren, M.D. examined the Claimant on January 10, 2003 at the request of Donna Besch, a representative for BIW. EX 33 at 4. He also reviewed a number of medical records from other treating physicians and diagnostic studies, including an MRI done on March 21, 2001 and x-rays from 1997 and 2001. *Id.* at 5-6. Dr. Agren opined that the underlying cause of the Claimant's neck pain was cervical spondylosis, which is significant arthritis in the neck that develops gradually over time. *Id.* at 5. Cervical spondylosis is an arthritic condition that is permanent and can be treated, but not cured. *Id.* at 9. Dr. Agren testified that according to the medical report of Dr. Peter Guay, an orthopedist who treated the Claimant in 1997, cervical spondylosis was diagnosed by x-ray by in 1997, and was likely diagnosable five years prior to that, in the early 1990s. *Id.* at 7-8. Dr. Agren stated that most of the effects of the March 16, 2001 injury have resolved because the C-7 radiculopathy has improved. *Id.* at 12. However, Dr. Agren said that the injury aggravated the Claimant's underlying condition and the pain that the Claimant continues to experience is due to the cervical spondylosis. *Id.* at 12, 14-15.[1] Further, Dr. Agren concluded that the aggravation of spondylosis is worse now and causes more restrictions that it would have if the March 16, 2001 accident had not occurred. *Id.* at 15. Dr. Agren opined that the Claimant has been at maximum medical improvement (MMI) since one year after his injury in March 2001, and therefore it is very unlikely that the Claimant will show any sudden improvement after March 16, 2002. *Id.* at 16-17.

According to Dr. Agren, the Claimant can be fully active with regard to walking activity, but should not have overhead work. EX 21 at 121. He can have light-duty work capacity, but should be allowed to change positions frequently. *Id.* Lifting should not be a significant part of his job because it would require the use of both of the Claimant's arms and would require him to move his neck more frequently. *Id.* He stated that the restrictions that he recommended for the Claimant are permanent and unlikely to change. EX 33 at 17-18. However, Dr. Agren testified that the restrictions are generically written, based on a one-time evaluation, and if he was the treating physician, he would examine what activities produce pain and caution the Claimant to stay away from those activities and any other activity that may cause further damage. *Id.* at 31, 35.

D. Additional Medical Evidence

Lee Thibodeau, M.D.'s report of a March 27, 2001 exam indicates that films from March 16, 2001 show diffuse spondylotic changes as well as C-7 radiculopathy. EX 17 at 91. In a report dated September 13, 2001, Dr. Thibodeau stated that "the radiculopathy has pretty much resolved" and "has responded to non operative treatment." *Id.* at 89. Further, "[the Claimant's] neck pain is to be expected given the significant multilevel degenerative changes" present. *Id.* at

[1] Although the evidence indicates that his radiculopathy has resolved and he is left with pain from cervical spondylosis, if a work related injury aggravates, accelerates, contributes to, or combines with a pre-existing disease or underlying condition, the resulting disability is compensable. *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814-815 (9th Cir. 1966). The parties have stipulated that the Claimant's cervical spine condition is work-related.

89.

Maria Mazzora, M.D. treated the Claimant for his neck injury from March 16, 2001 through July of 2002. TR 40-41. In May 2002, Dr. Mazzora stated that the Claimant "may have some work capacity, but in my opinion…does not have work capacity for shipfitting." EX 15 at 21. According to Dr. Mazzora, " [the Claimant] has come to the realization that he cannot return to work in this environment and I tend to agree due to the severity of his neck condition." *Id.* at 20. In July 23, 2002, Dr. Mazzora sent the Claimant to see Dr. Waterman and stated that the Claimant had "no work capacity." *Id.* at 18.

John Pier, M.D., in a report dated January 17, 2002 stated that "work capacity at this time would be limited…this includes no overhead work, left arm lift approximately 20 lbs and no looking overhead. Otherwise I would expect [the Claimant] to be able to tolerate employment." EX 22 at 125. After examining the Claimant, Michael Totta, M.D. stated in a report dated April 22, 2002 that the Claimant "does have sedentary or light work capacity." EX 16 at 81. In a follow up report on June 25, 2002, Dr. Totta stated that the Claimant "has limited physical capacity because of his hip and neck disease." EX 16 at 83.

According to the medical records, the Claimant's primary care physician, Jack Waterman, M.D. examined the Claimant five times from August through December of 2002, five times throughout 2003, and two times in 2004, and consistently noted the Claimant's "chronic" and "significant daily" pain due to a cervical injury. CX 7 at 26-48. He completed work capacity evaluation forms (OWCP 5c) on November 21, 2002 and September 2, 2003, which restricted the Claimant to two hours per day of sitting, walking, standing, and operating a motor vehicle. *Id.* at 30,35. Further, the work capacity evaluation dated November 21, 2002 limits the Claimant's overall work capacity to 2 hours daily. *Id.* at 30.

E. Testimony of Nancy Bogg

On September 23, 2002, the Department of Labor assigned Nancy Bogg, a vocational rehabilitation councilor, to meet with the Claimant at the request of Mr. Ross Nadeau from BIW. EX 36 at 6. On November 21, 2002, she received a work capacity evaluation form specifying the Claimant's restrictions from his treating physician, Dr. Waterman. *Id.* at 7. The restrictions were that the Claimant could work two hours sitting, two hours standing, two hours operating a motor vehicle, but could perform no reaching, no reaching above the shoulder, no twisting, no repetitive movement with the wrists and elbows of the left arm, no pushing, pulling, lifting, squatting, kneeling or climbing. *Id.* at 7. Ms. Bogg and the Claimant met five times, with the first meeting on October 17, 2002, and the last on July 22, 2003. *Id.* at 9. In working with the Claimant, she considered his union experiences an asset that demonstrated his ability to communicate well and negotiate. *Id.* at 11. She testified that there would be jobs available in Southern Maine for someone with the work restrictions provided by Dr. Agren, such as employment in direct sales which could pay anywhere from $6.50 to $9.50 an hour. *Id.* at 15-16. However, Dr. Waterman, the Claimant's primary physician, restricted him to two hours of work per day based on his neck condition and based on these restrictions, Ms. Bogg did not develop a plan for the Claimant because she was anticipating that his work capacity was going to increase and his work restrictions would decrease. *Id.* at 9-10, 16, 18. She testified that the Claimant

initially showed interest in working with her and exploring opportunities, but eventually indicated that he did not think he was employable. *Id.* at 16. In a report dated December 16, 2002, Ms. Bogg wrote that "the probability of successful rehabilitation is limited due to the restrictions as stated in the work capacity evaluation form and Mr. Littell's own view of his future capacities." CX 8 at 57. In a letter to the Claimant dated July 24, 2003, Ms. Bogg stated that "further vocational rehabilitation services are not appropriate at this time with only 2 hours of availability to work." *Id.* at 69. In July 2003, Ms. Bogg closed the file based on the Claimant's two hour work restriction provided by Dr. Waterman. EX 36 at 12.

F. Nature and Extent of Disability

The parties have stipulated that the Claimant sustained a work-related injury on March 16, 2001. The burden of establishing the nature and extent of disability as a result of that injury rests with the Claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1985). Disability is generally addressed in terms of its permanent or temporary nature and its total or partial extent. The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for the Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage earning capacity.

1. Nature of Disability

There are two approaches to determine the nature of a disability. The first "approach for determining whether an injury is permanent or temporary is to ascertain the date of 'maximum medical improvement.'" *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985) (citing *McCray v. Ceco Steel Co.*, 5 BRBS 537 (1977)). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *James v. Pate Stevedoring Co.*, 22 BRBS 271, 274 (1989). The date of MMI is a question of fact based upon the medical evidence of record. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). Under the second approach, a disability will be considered permanent if the claimant's impairment has continued for a lengthy period of time and appears to be of a lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969).

In this case, the parties have stipulated that the date of permanency for the Claimant's injury is March 16, 2002. Further, this stipulation of permanency is consistent with Dr. Agren's testimony that the Claimant continues to have a residual disability after reaching MMI a year after the March 16, 2001 injury. Therefore, I find that the Claimant's disability is permanent.

2. Extent of Disability

A three part test is used to determine whether a claimant is entitled to a total disability award: (1) a claimant makes a *prima facie* case of total disability by showing he cannot perform his former job because of a job-related injury; (2) once this *prima facie* showing has been made, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals with the same age, experience, and education as the employee. The employer meets its burden only by proving that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) a claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434; *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031 (5th Cir.1981), *Accord Trans-State Dredging v. Benefits Review Board,* 731 F.2d 199, 201 (4th Cir.1984); *Rogers Terminal v. Director, OWCP,* 784 F.2d 687, 691 (5th Cir.1986).

I must first address whether the Claimant has made a *prima facie* showing that he is unable to perform his former job because of the injury that he sustained on March 16, 2001. In this case, the testimony and medical evidence submitted indicates that the Claimant has had significant work restrictions placed upon him as a result of his work-related injury. Further, Dr. Mazzora took the Claimant out of work in November 2001 due to his pain, and he remained out through the end of her treatment of him. She has indicated that he has no work capacity and cannot return to work at BIW. In its brief, the Employer concedes that employing the Claimant in his former position is no longer appropriate, and the Claimant has established a *prima facie* case of total disability. BIW Br. At 5. Given the restrictions placed on him by his treating doctors, including his primary care physician, Dr. Waterman, it is clear that the Claimant is unable to return to his former job as a result of the work-related injury that he sustained.

Having met his initial burden of proof, the burden then shifts from the Claimant to the Employer to show that suitable alternative employment is readily available in the Claimant's community for individuals of the same age, experience, education and physical restrictions as the Claimant, which requires proof that there is a reasonable likelihood, considering these factors, that the Claimant would be hired if he diligently sought the job. *Trans-State Dredging v. BRB*, 731 F.2d 199, 200 (4th Cir. 1984). Further, an employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in his geographic area. *Royce v. Erich Constr. Co.*, 17 BRBS 157 (1985); see also *Williams v. Halter Marine Serv.*, 19 BRBS 248 1987). The First Circuit adopted a slightly different standard in *Air America, Inc. v. Director, OWCP*, and held that the severity of the Employer's burden must reflect the reality of the situation. 597 F.2d 773, 779-780 (1st Cir. 1979). The First Circuit held that it would not place the burden of establishing that actual available jobs exist on the employer in all cases and specifically that it would not do so when it is "obvious" that there are available jobs that someone of the claimant's age, education, and experience could do. *Id.* Although the court in *Air America* rejects a mechanical rule, the court states that "it is reasonable to require the employer to make such a strong showing [of availability of an actual job opportunity] when a claimant's inability to perform any available work seems probable, in light of claimant's physical condition and other circumstances such as claimant's age, education, and work experience." 597 F.2d at 779

BIW, relying on *Air America*, asserts that they have met their burden under this standard because according to all of the physicians on record except for Dr. Waterman, the Claimant can "work full-time, doing light-duty work" and has "many transferable skills, developed greatly during his time as a chief steward and a business representative of the union." BIW Br. At 6-7. The claimant in *Air America* was a pilot who had completed two years of college. He also had experience with brokerage and personnel work and while his impairment precluded him from flying, it did not preclude him from working at any number of desk jobs. The First Circuit explicitly noted that the claimant admitted he was capable of a desk job but had made no attempt to look for any work since leaving Air America. 597 F.2d at 778. In fact, as the Court stated, the claimant had been offered a job in a brokerage business which he declined. Under these circumstances the Court determined that the burden placed upon the employer did not require the employer to show the actual availability of other jobs. 597 F.2d at 579-580.

In the present case, the Claimant does not have any education beyond high school. The Claimant's work restrictions as defined by his primary care physician do not allow him to work in excess of two hours per day. The Claimant has chronic neck pain which limits the amount and type of work that he can perform. Although he may have shown leadership and negotiation skills in his former roles with the union and those skills may be transferable, that does not extend the daily work restriction of two hours, which is the basis for Ms. Bogg's decision to close his vocational rehabilitation case. This case is distinguishable from *Air America* because the Claimant has only a high school education and he has significant work restrictions. In such circumstances it is reasonable to require BIW to make a showing of actual jobs, and it is probable that the Claimant will be unable to perform any available work based on his physical condition and the two hour work restriction. In her testimony, Ms. Bogg gave examples of jobs that theoretically may be available to the Claimant, but she based these findings on the restrictions recommended by Dr. Agren, not those of Dr. Waterman. BIW has not demonstrated the existence of any actual jobs, and it is unlikely that the Claimant will be able to retain employment that is compliant with the work restrictions placed on him by Dr. Waterman. Therefore, I conclude that the facts here are sufficiently different from those present in *Air America* to warrant a finding that BIW is required to show the actual existence of alternative work.

The Employer argues further that Ms. Bogg's reliance on the limitations and work restrictions set by Dr. Waterman are misplaced, as he is the only physician of record who determined that the Claimant had only a two hour daily work capacity. BIW Br. At 7. However, Dr. Waterman is the primary care physician responsible for treating the Claimant as a whole. He examined the Claimant multiple times in 2002, 2003, and 2004, and continuously monitored and recorded the Claimant's symptoms of pain and discomfort. Further, the other physicians who examined the Claimant and recommended less stringent restrictions saw the Claimant only once or a limited number of times. Dr. Agren, upon whose recommended work restrictions Ms. Bogg testified that jobs would be available, acknowledged that his restrictions were "generic" as he only examined the patient once and he stated that if he were the treating physician he would do further examination of the specific activities that cause the Claimant pain and recommend avoiding those activities. Therefore, Dr. Agren's restrictions are not tailored exclusively and narrowly to the Claimant. On the other hand, Dr. Waterman has the advantage of having continuously assessing and treating the Claimant's condition and therefore is the physician in the

best position to make knowledgeable recommendations based upon complete information. Therefore, I credit his opinion regarding the Claimant's physical restrictions over those of other physicians. I do not find that Ms. Bogg's reliance on Dr. Waterman's restrictions was inappropriate, and therefore, the Employer fails to meet its burden to demonstrate the existence of alternative job opportunities for the Claimant.[2]

G. Compensation Due

In the case of permanent total disability, Section 8(a) of the LHWCA provides for a compensation rate of two-thirds of an employee's average weekly wage during the continuance of the total disability. 33 U.S.C. §908 (a). Under the provisions of the Act, the Claimant's permanent total disability entitles him to an award of compensation at a rate equal to two-thirds of his stipulated average weekly wage of $621.48, or $414.32 per week for the duration of the total disability. The commencement date for compensation payments is March 16, 2002, which is the stipulated date of permanency for the Claimant's injury.

H. Special Fund Relief

BIW seeks relief from its liability for the Claimant's compensation pursuant to the Special Fund provisions of Section 8(f) of the Act.

1. Timeliness

Section 8(f) of the Act limits an employer's liability for permanent partial disability, permanent total disability and death benefits to a period of 104 weeks, after which compensation liability is assumed by a Special Fund established pursuant to 33 U.S.C. § 944, when the disability or death is not due solely to the injury which is the subject of the claim. 33 U.S.C. § 908(f); *Lawson v. Suwannee Fruit & Steamship Co.*, 336 U.S. 198, 200 (1949). To avail itself of relief under this provision, an employer or insurance carrier must file a fully supported application for Section 8(f) relief with the District Director, Office of Workers' Compensation Programs (the "District Director"). 33 U.S.C § 908(f); 20 C.F.R. § 702.321 (2004). The record shows that BIW timely and properly submitted its application for Section 8(f) relief with OWCP on August 27, 2003. EX 28. Accordingly, I find that the Employer's application for Section 8(f) relief was timely filed, and I will proceed to review the merits of the Employer's application.

2. Merits

In addition to filing a timely and sufficiently documented application, an employer carries the burden to prove that it has met the elements of Section 8(f) relief. *Dir., OWCP v. Bath Iron Works Corp.*, 129 F.3d 45, 50 (1st Cir. 1997); *Perry v. Bath Iron Works Corp.*, 29 BRBS 57, 58 (1995). An employer in a permanent and total disability case must meet four

[2] The Employer asserts that the Claimant failed to meet his burden of showing that he performed a diligent work search, and therefore must not be entitled to a finding of total disability. BIW Br. At 7-8. However, as the Employer has failed to carry its burden to show that alternative suitable jobs were available, I need not reach the issue of motivation raised by the Employer. *See Royce v. Erich Constr. Co.*, 17 BRBS 157 (1985).

requirements to avail itself of Section 8(f) relief: (1) there must be a new injury; (2) the employee must have a preexisting permanent partial disability; (3) the preexisting disability must have been manifest to the employer prior to the subsequent injury or death; and (4) the employee's permanent total disability or death must not be solely due to the subsequent injury. *Dir., OWCP v. Gen. Dynamics Corp.*, 982 F.2d 790, 793 (2nd Cir. 1992); *Dir., OWCP v. Luccitelli and Reiss*, 964 F.2d 1303, 1305,1306 (2nd Cir. 1992) *see also,* 33 U.S.C. §908(f). Based on the evidence of record, I find that the Employer satisfies all four criteria.

The parties stipulated that a new injury occurred on March 16, 2001, meeting the first requirement for Special Fund relief. The second criteria that must be met is that the Claimant must have a preexisting permanent partial disability. Although there is a great deal of evidence in the record as to the existence of preexisting hip and knee injuries, there is no evidence that these injuries contributed to the symptoms resulting from the Claimant's neck injury on March 16, 2001. However, as early as 1997, the Claimant was diagnosed with degenerative spondylosis or arthritis, which medical testimony and evidence have indicated is a contributing factor to the Claimant's continuing neck pain. The spondylosis was initially noted in Dr. Guay's 1997 medical report, prior to the March 16, 2001 injury, and it has been subsequently observed by Dr. Agren in his review of the Claimant's medical records, including those from 1997, and by Dr. Thibodeau and Dr. Schraft in March 2001. Further, Dr. Agren has testified that cervical spondylosis is a permanent and incurable condition. Thus, there is evidence that the Claimant's cervical spondylosis is a permanent disability that existed prior to the March 2001 neck injury.

Third, the manifestation requirement for Section 8(f) relief will be met if the employer had knowledge of the claimant's preexisting disability prior to the subsequent injury. Constructive knowledge may be established by medical records that were in existence at the time of the subsequent injury and from which the preexisting condition was readily discoverable. *Director, OWCP v. Universal Terminal & Stevedoring* (DeNichilo), 575 F.2d 452, 457, 8 BRBS 498, 504 (3d Cir. 1978). A report by Brian McGrory, M.D. from 1997 following the Claimant's hip replacement stated that x-rays taken of the patient's cervical spine showed "evidence of significant arthritis." EX 25 at 139. The evidence establishes that the Claimant's preexisting disability was manifest to BIW because there are medical records in existence prior to the March 16, 2001 injury from which the nature and full extent of his pre-existing condition of cervical spondylosis was objectively determinable. *See Esposito v. Bay Container Repair Co*., 30 BRBS 67, 68 (1996).

Finally, Dr. Agren and Dr. Thibodeau have both independently concluded that even though the symptoms from the radiculopathy that the Claimant suffered as a result of the March 16, 2001 injury have dissipated, the Claimant is left with chronic pain stemming from the spondylosis that was aggravated by the work injury. Dr. Agren testified that the symptoms from the spondylosis are worse and cause more restrictions than they would have if the March 2001 injury had not occurred. The Claimant's testimony as well as the medical records reflect that the Claimant's underlying condition is a significant contributing factor to his pain and work restrictions, and therefore, his permanent total disability is not due solely to his work-related neck injury.

Based upon the foregoing findings, I conclude that BIW has established that it is entitled

to liability relief from the Special Fund. Since the Employer has satisfied the elements necessary for Section 8(f) relief, its permanent total disability compensation liability is limited to the statutory period of 104 weeks.

I. Credit

Section 14(j) of the Act provides that "[i]f the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installment of compensation due." 33 U.S.C § 914(j). This provision allows the employer a credit for its prior payments of compensation against any compensation subsequently found to be due. *Balzer v. General Dynamics Corp.*, 22 BRBS 447, 451 (1989), *on recon., aff'd*, 23 BRBS 241 (1990); *Mason v. Baltimore Stevedoring Co.*, 22 BRBS 413, 415 (1989). Further, the employer is entitled to a reimbursement for overpayment where the Special Fund has assumed the payments to the Claimant. *See Director, OWCP v. General Dynamics Corp.* (Krotsis), 900 F.2d 506, 23 BRBS 40 (CRT) (2d Cir. 1990), aff'g *Krotsis v. General Dynamics Corp.*, 22 BRBS 128 (1989); *Balzer v. General Dynamics Corp.,* 22 BRBS 441 (1989), aff'd on recon., 23 BRBS 241 (1990).

The parties have stipulated that the Employer has paid the Claimant for temporary total disability for a period from March 27, 2001 to May 9, 2001, and then for a period commencing on November 27, 2001 and continuing. Based on my decision, the employer is required to pay permanent total disability to the Claimant from the date of permanency, March 16, 2002, for a period of 104 weeks, at which time the Special Fund will assume the continuing disability payments to the Claimant. Given that the 104 week statutory liability limitation expired on March 17, 2004, the Employer is entitled to a credit from the Special Fund for the total disability payments plus interest made to the Claimant in excess of 104 weeks from the date of permanency of the disability.

J. Attorney Fees

Having successfully established his right to compensation, the Claimant is entitled to an award of attorney fees under section 28 of the Act. *American Stevedores v. Salzano* 538 F. 2d 933, 937 (2nd Cir. 1976). On August 23, 2004, counsel for the Claimant, James W. Case, submitted a timely application for attorney's fees in the amount of $11,325.33. On August 31, 2004, BIW filed an objection to the Claimant's attorney fee application. The attorney for the Claimant failed to respond to the Employer's objections.

In the present matter, the Employer makes five objections. First, the Employer objects to the fee application to the extent that it includes fees for time spent in front of the Office of Workers' Compensation Programs ("OWCP"). The Office of Administrative Law Judges ("OALJ") has authority to approve fees only for services performed before this office. *See Revoir v. General Dynamics Corp.*, 12 BRBS 345 (1983). The OALJ thus has no authority to approve fees for services performed before the OWCP, and the objection is therefore sustained. As the original petition contained fees and costs associated with services performed before the OWCP, the fees must be reduced by 9.15 hours at an hourly rate of $220 (for counsel's time), and 0.4 hours at an hourly rate of $65 (for paralegal time) resulting in a $2039.00 reduction in fees. In addition, the costs must be reduced by $72.78 (representing costs incurred when the

claim was at the OWCP), for a total reduction of $2111.78. This leaves a remaining balance of $9213.55 which represents only the services performed before the OALJ after the case was transferred from the OWCP on February 10, 2004.

Second, the Employer objects to a duplication of efforts by Attorney Case and a paralegal prior to and following the deposition of Nancy Bogg on May 11, 2004. The itemized fee application submitted by Attorney Case shows that he charged 4.5 hours on May 11, 2004 for preparation for, travel to, and attendance at the deposition. On May 17, 2004, Attorney Case charged 1.4 hours for reviewing the Employer's exhibits and pretrial statement, and on May 20, 2004, he charged 0.5 hours for reviewing the transcript of the deposition of Ms. Bogg. On May 21, 2004 a senior paralegal charged 6.5 hours to review the file, exhibits, and transcripts and prepare a hearing memo for Attorney Case. The Employer alleges that this is a duplicate charge, as the paralegal is billing for work that Mr. Case has already completed, and I agree. This appears to be a duplication of efforts or an inefficient use of time for which the Employer is not financially liable. I therefore sustain the objection and reduce the amount of hours charged by the senior paralegal on May 21, 2004 from 6.5 to 2, thereby reducing the amount owed by the Employer by $292.50, resulting in a total balance of $8921.05.

Third, the Employer objects to Attorney Case's repetitive and excessive review of files. Attorney Case charged 4.5 hours on May 28, 2004 for preparation for, travel to, and attendance at the deposition of Dr. Mats Agren, charged 1.5 hours on June 14, 2004 for preparing his client for testimony at the June 21 hearing, and charged 3.5 hours on June 20, 2004 to review files in preparation for the hearing. Dr. Agren was the Employer's medical expert and it was necessary for Attorney Case to prepare in order to understand and counter his testimony. I do not find that the hours expended are repetitive or excessive, and I therefore overrule this objection.

Fourth, the Employer argues that Attorney Fongemie's review of the file, research, and drafting of the brief in this case resulted in an unnecessary duplication of efforts, and I agree. Attorney Case has represented the Claimant from the beginning of the case and has had the opportunity to become familiar with the case history, attend the depositions and hearing, and review the evidence of record. Attorney Fongemie certainly required more time to research and draft the brief than Attorney Case would have, because Attorney Fongemie had to familiarize himself with the evidence and the issues in the case before beginning to research and write the brief. I therefore sustain this objection and reduce the amount of hours charged by Attorney Fongemie on August 4, 2004 by half, from 5.9 hours at an hourly rate of $190 to 2.95 hours at the same rate. This results in a fee reduction of $560.50, resulting in a final balance of attorney fees of $8360.55.

Finally, the Employer asserts that the hourly rate requested by the Claimant's attorney, $220, is excessive. Based on Attorney Case's experience and the quality of his representation, I disagree. This and other Administrative Law Judges have found that $220 is a reasonable hourly rate for other partners in Attorney Case's firm. *See Woods v. BIW*, 2004-LHC-00980 (approving an hourly rate of $220 for an attorney at Attorney Case's firm); *Wallace v. Bath Iron Works*, (same). The Employer provides no documentation or other evidence to support the position that the hourly fee is unreasonable. Therefore, I find that $220 is a reasonable hourly fee and the objection is overruled.

In sum, I have sustained the Employer's objection to charges incurred prior to the date the claim was referred to the OALJ and to allegations of duplicate efforts regarding paralegal time and time to prepare the Claimant's post-hearing brief. Therefore, the total amount of attorney fees sought, $11,325.33, is reduced by a total of $2892 in fees, and $72.78 in costs, for a total remaining balance of $8360.55.

III. Order

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following compensation order is entered:

1. The Employer, Bath Iron Works, shall pay directly to the Claimant, Thomas Littell, permanent total disability compensation benefits pursuant to 33 U.S.C.§ 908(a) from March 16, 2002 for a period of 104 weeks based on an average weekly wage of $621.48;

2. Commencing on March 17, 2004, the expiration of 104 weeks of permanent total disability compensation paid by the Employer, the Special Fund shall assume liability for payments to the Claimant for permanent total disability benefits pursuant to 33 U.S.C. § 908(c)(13) for the continuation of the total disability;

3. The Employer is entitled to a reimbursement from the Special Fund for all payments plus interest made to the Claimant after the expiration of 104 weeks of permanent total disability compensation;

4. The Employer shall provide the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related neck injury may require pursuant to 33 U.S.C. § 907;

5. The Claimant's attorney has filed a fully supported and fully itemized fee petition pursuant to 20 C.F.R. 702.132(a), and the counsel for the Employer has filed his objections. The Employer shall pay the Claimant's attorney fees and costs in the amount of $8360.55;

6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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COLLEEN A. GERAGHTY
Administrative Law Judge

Boston, Massachusetts